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No. 91-1498

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK ALTAMORE

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

REPLY BRIEF TO BRIEF IN OPPOSITION

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This brief is submitted in reply to the brief for Respondent Newsday, Inc. submitted in opposition to petitioner's Petition for Certiorari. While, petitioner continues to rely upon his arguments submitted in support of his position, he is compelled to address certain matters raised in respondent's opposition brief, Rule 15.6.

Firstly, petitioner addresses respondent's jurisdictional argument. Respondent incorrectly contends that petitioner has "failed to properly present a Federal question in the State proceedings." Contrary to respondent's assertion, the fact that petitioner originally sought vacatur pursuant to Section 7511 of the New York Civil

Practice Law and Rules rather than Section 301 of the Labor-Management Relation Act, is simply irrelevant. The fact remains that the New York State Courts expressly rejected petitioner's public policy arguments. ***See*** page 7 of petitioner's Petition for Certiorari. Even, respondent, at page 15 of its brief, acknowledges that the New York Court rejected petitioner's public policy argument. This public policy argument, as petitioner contends, is firmly rooted in Federal Law. To argue otherwise, as respondent seeks to do, insults the intelligence of this Honorable Court. Thus, no matter how initially presented, it is clear that the public policy argument is a Federal question which was presented to and rejected by the State Courts. Respondent's effort to assert otherwise must be rejected by this court.

Respondent's recitation of the facts is also characteristically inaccurate. For example, the record reflects that, contrary to respondent's assertion at page 10 of its brief, Dr. Dickman did not confirm the diagnosis of Dr. Housman. Nor did Dr. Housman say petitioner could not perform his customary duties as a handman.[1/] On the other hand free of charge petitioner's physicians Dr. Dickman and Dr. Marks both neurologist specialists noted that petitioner could return to work to perform his customary handman duties.[2/]

1/ **Dr. Housman's evaluation report in part:**

"....an occupation which required him to.... would be very difficult for this gentleman to perform."

"I think that he is disabled for any kind of work other than a sedertary position which does not require a great deal of visual tracking responses".

2/ **Dr. Dickman's evaluation report in part:**

"The above named patient continues to show considerable improvement which is more pronounced, since his last neurological examination."

"He may return to work under certain restrictions."

(continued...)

Respondent's efforts to employ Dr. Housman for a fee was nothing more than a ''sting operation'' to entrap petitioner.[3/] Arbitrator House violating the standards, blatantly biased and prejudiced, supported respondents sting operation putting petitioner in a no win position by ignoring medical evidence from two of petitioner's physicians and refusing to grant an independent medical examination upon the request of petitioner.[2/]

Respondent also improperly, as it has done all along, injects irrelevant matter into this proceeding in order to cloud the issues. For example, it utilizes an entire point arguing that ''petitioner was not a formal party to the collective bargaining agreement or the arbitration proceeding and, consequently has no standing to bring this petition''. The fact remains, that the contrary holding was reached by the New York Supreme Court Appellate Division - Fourth Department. Respondent rehashes the very same argument that the New York Court rejected. Respondent never appealed that determination. As

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2/ *(continued....)*

Dr. Marks evaluation report in part:

"There is no evidence of... neurological dysfunction or disability."

Dr. Marks testimony in part:

"....the second time he was seen the abnormality was gone."

"...and then when I saw him the third time the exam was again normal, as it had been on May 8th."

"...and my exam corroborated the May exam in that his neurologic exam was normal. And I had known that it had been in the past abnormal...
...I can say that he had improved."

3/ **Respontents letter of discharge in part:**

"Newsday has been advised by Dr. Housman that you suffer from permanently disability which precludes your return to employment at Newsday in your previous position".

such, the determination finding that petitioner **did** have standing is the law of this case and must be sustained.

Respondent's similar attempt to argue that petitioner was not ''otherwise qualified'' must also be rejected. Again, in its zeal to cloud and confuse the issues, respondent's assertion is misplaced and fatally flawed. The focus is not upon whether ''Petitioner suffered from a permanent disability which rendered him unable to report for and to perform any of the normal work which might be available for assignment.''[4/] Respondent's brief at page 27. On the contrary Respondent Dr. Housman and the Arbitrator had the best of both worlds putting petitioner in a no win position.

On the other hand, petitioner continues to assert that the requirement that an employee be able to show that he was otherwise qualified was met in this case by petitioner physicians,[2/] past practice and usage also other contractual sections and laws. We must remember that respondent not only refused to make allowances for light duty for petitioner to return to work[5/]; but that, at the time of dismissal, petitioner was a long standing employee with job guarantee.[4/] See page 4 of Petition for Certiorari. Ultimately, respondent dismissed petitioner, despite his presence on the job security list. The record revealed that respondent has a long history of not dismissing disabled employees whether permanently or

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4/ Provision of Section 3 of Contract in part:

"It is further understood that this Job Security Agreement is irrevocable.....".

5/ Respondent supervisors department letter in part:

"Frank Altamore is employed by this company as a handman..."

"We cannot make allowances for light duties in this classification."

temporarily disabled, especially those on the job security list.[6/] Not only were other disabled job guaranteed employees permitted to retain their security rights under similar circumstances including some out over 12 years; but petitioner's mere placement on the job security list insured that a physical disability would not render him unqualified, regardless of his actual ability to work. **See** page 11 and 14 of petitioner's Petition for Certiorari.

Respondent has failed to address this most important point. In any case, there was no evidence that petitioner could not perform his customary duties, contrary to respondent's who continuous assertions as to Dr. Housman and arbitrator House.

In sumary, respondent has created smoke screens, which this Honorable Court must pierce. The ''bottom line'' is that petitioner had a irrevocable job guarantees with lifetime benefits.[4/]

The fact that he became disabled, whether permanently or temporarily, should not have affected the continued retention of

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6/ **Arbitrator questioned petitioner, page 607 September 30, 1986, in part:**

"Are you saying -- I'm trying to understand -- that what happened to you thereafter was because of your having set off the N.L.R.B. Case."

Petitioner's Answer:

"Yes."

Testimony Union Chapel Chairman Robert Housman, page 65-68 January 21, 1987, in part:

Attorney's Question:

"Mr. Housman, sir, during your tenure of the various positions you've held from 1979 through 1985 was any union employee discharged for illness... "

(continued...)

those benefits. Even respondent at pages A1 through A5 of its brief acknowledge petitioner's public policy argument firmly enrooted with the facts herein. This is a most important public policy argument. Petitioner was denied the right to return to his duties because of nofactural evidence by respondent and arbitrator House.

This Honorable Court should therefore grant petitioner's Petition pursuant to the appropriate review standards.

Respectfully submitted,

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6/ ***(continued...)***

Answer:

"Not that I know of, no."

Atty Q.: **"....Chester Brown, ...out on an extended illness leave?"**

A.: **"Yes."**

Atty Q.: **"Was he ever discharged for cause?"**

A.: **"Not that I know of, no."**

Atty Q.: **"And would your answer to Mr. Chapman be the same as to Mr. Chester Brown?"**

A.: **"Yes, I would say as I recall, yes."**

(continued...)

6/ *(continued...)*

Respondent Mobilio testimony, page 1209-1213 December 4, 1986, in part:

Atty Q.: **"From the date in 1983 when you became General Foreman until you discharged Mr. Altamore was there any other employee who was on medical absence for more than 30 days?"**

A.: **"Yes."**

Atty Q.: **"....how many?"**

A.: **"Two, I believe."**

Atty Q.: **"....their names?"**

A.: **"William Chapman and Chester Brown."**

Atty Q.: **"Have they been discharged by Newsday?"**

A.: **"No."**

Atty Q.: **"....how long ..... out ill?"**

A.: **"18 months, one year."**

Atty Q.: **"Were they requested by you to submit to an examination?"**

A.: **"No, they were not."**

Testimony Union Representative Dennis O'Rouke, page 8-9, 28-30, January 21, 1987, in part:

Atty Q.: **"During your position as Chapel Chairman were there any discharges for neglect of duty as a result of a union member being unable to attend to his duties as a result of illness?"**

A.: **"No, not that I can recall."**

Atty Q.: **"....Chester Brown... ...ill for a period...?"**

A.: **"I think he was."**

Atty Q.: **"Was he discharged for cause?"**

A.: **"He was not discharged."**

Atty Q.: **"....William Chapman? ....posing the same question...."**

A.: **"Yes, he was not discharged."**

(continued...)

6/ *(continued...)*

Testimony Union Representative Maurice Naples, page 1132 December 4, 1986, in part:

Atty Q.: **"Now, while you were Chapel Chairman was there anybody who was discharged for neglect of duty as a result of their sickness or their physical inability to be present to perform their job?"**

A.: **"No, not that I know of."**

Testimony Union Representative Joe Gagnon, page 1056-1067 November 24, 1986, in part:

Atty Q.: **"During your tenure at Newsday, and more specifically as Chapel Chairman and as a member of the scale committee, were there any discharges based upon illness?"**

A.: **"Not to my knowledge."**

Atty Q.: **"Was there any discharge based upon the cause, quote, unquote, nondisciplinary reason?"**

A.: **"Not to my knowledge."**

Atty Q.: **"....any discharge for cause based upon illness?"**

A.: **"Not to my knowledge."**

Testimony Union Representative George Triant, page 1089-1100 November 24, 1986, in part:

A.: **"During my term of office as President I was aware of three members who were out on disability."**

Atty Q.: **"Do you know if any of those employee - union members were discharged?"**

A.: **"Not to my knowledge."**

Atty Q.: **"...were there any discharges of employees for prolonged illness on the basis of quote, unquote, neglect of duty?"**

A.: **"I can only answer as Chairman and President. ...there weren't any to my knowledge."**

Atty Q.: **"...were any employees... ...who were not working because of disability, ever requested to submit to a medical examination by the company?"**

A.: **"I have no knowledge."**